UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Crim. No. 13-10238-DPW
DIAS KADYRBAYEV,	)	
	)	
Defendant.	)	

GOVERNMENT'S SENTENCING MEMORANDUM

On August 21, 2014, defendant Dias Kadyrbayev ("defendant" or "Kadyrbayev") pled guilty to Counts One and Two of the Superseding Indictment. Count One of the Superseding Indictment charged Kadyrbayev with conspiring with Azamat Tazhayakov ("Tazhayakov") to violate 18 U.S.C. § 1519 by agreeing to knowingly alter, destroy, conceal, and cover up a laptop computer and a backpack containing fireworks and other items, belonging to Dzhokhar Tsarnaev, with the intent to impede, obstruct, and influence the FBI's investigation into the Boston Marathon bombings, in violation of 18 U.S.C. § 371. Count Two charged the defendant with obstruction of justice, in violation of 18 U.S.C. § 1519, based on the alteration, destruction, concealment, and covering up of the same objects. The United States submits this memorandum in support of its recommendation that the Court impose a sentence of: (1) imprisonment for a period of seven years, (2) 36 months of supervised release, (3) a fine at the low end of the Guidelines sentencing range (unless the Court finds that the defendant is unable to pay such a fine), and (4) a mandatory special assessment of $200. In the government's judgment this sentence is a reasonable and appropriate disposition of this case in that it is "sufficient, but not greater than necessary" to comply with the purposes of the Sentencing Reform Act. *See* 18 U.S.C. § 3553(a). This sentence reflects the seriousness of the crimes committed and the need for deterrence while also recognizing the defendant's acceptance of responsibility and lack of a

criminal history.

There is no evidence that Kadyrbayev was aware of Tsarnaev's plan to bomb the Boston Marathon or played any role in that terrorist attack. Nevertheless, Kadyrbayev conspired with Tazhayakov to obstruct a terrorism investigation and affirmatively acted to impede the bombing investigation at the critical moment when the investigation was intensely focused on locating the Tsarnaev brothers and thwarting further acts of violence. As detailed in the Pre-Sentence Report and Stipulation of Facts, on the evening of April 18, 2013, after viewing photographs of the two Boston Marathon bombers, Kadrybayev went with two friends, Tazhayakov and Robel Phillipos, to Dzhokhar Tsarnaev's dormitory room and removed evidence from Tsarnaev's room rather than contacting law enforcement authorities. These actions obstructed a federal terrorism investigation. Kadyrbayev had in his power the ability to assist law enforcement in identifying a terrorist and prevent further acts of violence, including possibly the murder of MIT Police Officer Collier and the gun battle in Watertown, yet he chose to engage a series of actions designed to impede, obstruct, and influence the FBI's Boston Marathon bombing investigation. After being alerted by Robel Phillipos that Tsarnaev's picture was being broadcast on news outlets as one of the two Boston Marathon bombers, Kadyrbayev contacted Tsarnaev, reporting that he had seen Tsarnaev's photograph on the news. Shortly after exchanging text messages with Tsarnaev, Kadyrbayev made plans with Tazhayakov to go to Tsarnaev's dormitory room. Once inside Tsarnaev's dormitory room, Kadyrbayev frantically searched the room and found several items of evidentiary value, including a backpack containing fireworks, which had been partially emptied of their explosive powder. He showed the backpack to Tazhayakov and they agreed to remove the backpack from Tsarnaev's room. Kadyrbayev also found Tsaranev's laptop computer. At approximately 10:30 p.m., when Kadyrbayev,

Tazhayakov, and Phillipos left Tsarnaev's room, Kadyrbayev took these items with them. Kadyrbayev, accompanied by Tazhayakov and Phillipos, brought the items back to the New Bedford apartment he shared with Tazhayakov. Over the course of the early morning hours of April 19, 2013, while monitoring the manhunt for Dzhokhar and Tamerlan Tsarnaev, Kadyrbayev and Tazhayakov decided to get rid of Tsarnaev's backpack. As a result, Kadyrbayev threw Tsarneav's backpack and its contents into a garbage dumpster outside their apartment. After discarding Tsarnaev's backpack in the garbage, Kadyrbayev decided to keep Tsarnaev's laptop computer and continue to conceal it in his apartment and did not attempt to return it to Tsarnaev's dormitory room.

Rather than heeding the FBI's plea for help from the public, the defendant and Tazhayakov interfered with the administration of justice and impeded the investigation by causing the unnecessary expenditure of substantial government resources and inhibiting the investigative efforts of federal law enforcement officers.

I. Facts

The government relies upon the facts contained in ¶¶ 8-18 and 20-23 of the PSR and stipulation of facts. The defendant has objected to several of the facts contained in the PSR. These objections are primarily based upon two grounds. First, the defendant claims he lacked certainty that Tsarnaev was one of the two Boston Marathon bombers when he committed the charged obstructive conduct and, second, the defendant argues that his conduct did not actually obstruct a federal terrorism investigation.

What is uncontroverted is that Kadyrbayev signed a stipulation of facts regarding his conduct on April 18 and 19, 2013. By signing the stipulation of fact, Kadyrbayev admitted that

> On the evening of April 18, 2013, Kadyrbayev believed that Dzhokhar Tsarnaev was one of the two Boston Marathon bombers and was being investigated in

> connection with the bombings. Kadyrbayev removed and concealed items from Tsarnaev's dormitory room, including the laptop computer and backpack, placed the backpack and its contents into a garbage dumpster, and hid Tsarnaev's laptop computer in his apartment with the intent to impede, obstruct, and influence an FBI investigation.

Stip. at ¶ 16. This stipulation was read at the Rule 11 hearing and served as the factual basis for Kadyrbayev's guilty plea. *See* Rule 11 Tr. at 17-23. At the Rule 11 hearing, this Court also confirmed that Kadyrbayev agreed that all of the facts contained in the stipulation were true and that the defendant intended to conceal Tsarnaev's laptop computer in his apartment for the purpose and with the intent to impede, obstruct, and influence the FBI's bombing investigation. *Id.* at 23. The defendant's claim that when he acted to obstruct justice he was not certain that Dzhokhar Tsarnaev was one of the two Boston Marathon bombers but he merely suspected as much misses the point. *See* Def. Objections #1 and 5. To prove a violation of Section 1519, the government need only prove that the defendant acted with the intent to impede, influence, or obstruct a federal investigation. The defendant admitted that he acted with the requisite *mens rea.*

Moreover, the defendant's own statements refute his lack of knowledge claims. Hours before Dzhokhar Tsarnaev was publicly identified as one of the two suspected Boston Marathon bombers, during the early morning hours of April 19, 2013, Kadyrbayev told associates in Kazakhstan that his best friend was the bomber. Between 3:39 a.m. and 4:14 a.m., Kadyrbayev sent numerous messages using his VK[1] account that demonstrated his knowledge that Tsarnaev was one of the two bombers. For instance, he stated the following:

- That's Jaha [sic] fucked Boston.

[1]VK is similar to Facebook. It is the second largest social network service in Europe after Facebook. Like Facebook, VK allows users, among other things, to message contacts publicly or privately.

- It's fucking, like September 11 here, figure this, just in Boston and my bro did this.
- My best friend did this.
- They identified their faces today. And Jahar fucking escaped meanwhile... Then they hijacked a car, killed a policeman.

The defendant objected to the inclusion of his VK messages in the Pre-Sentence Report. Despite any suggestion to the contrary, these messages were not included to imply that Kadyrbayev shared Tsarnaev's extremist views of Islam. To the contrary, the VK messages were included to show the defendant's state of mind at the time when he committed the obstructive conduct at issue here and his knowledge that Tsarnaev was being investigated for committing acts of terrorism in downtown Boston. Here again, despite knowing about the devastation Tsarnaev had caused and his violent confrontations with police on the evening of April 18, 2013, Kadyrbayev chose to conceal evidence relevant to the bombing from the police.

Kadyrbayev also objects to the assertion that he actually obstructed a federal terrorism investigation. This objection is meritless. Because of the defendant's actions, over the course of two days, April 25, 2013 and April 26, 2013, 25 federal agents searched a garbage landfill for the evidence Kadyrbayev had placed in the trash. Additionally, the defendant removed critical evidence from Tsarnaev's dormitory room and jeopardized the chain of custody and the government's ability to introduce critical evidence at Tsarnaev's trial. These actions substantially interfered with the administration of justice and adversely affected the Boston Marathon bombing investigation.

II. Advisory Guideline Calculations

The PSR correctly calculates the defendant's adjusted offense level to be 42, which is decreased by three levels for his acceptance of responsibility, yielding a total offense level of 39. The defendant objects to the application of both the Terrorism Enhancement under §3A1.4 and the Accessory after the Fact Guideline, §2X3.1. As described below, Probation properly

calculated the Guidelines in this case.

As the PSR notes, the Guideline applicable to conspiracy to obstruct and substantive obstruction counts is U.S.S.G. §2J1.2. Pursuant to § 2J1.2(a), the base offense level ("BOL") is 14. The PSR correctly applies the cross-reference in U.S.S.G. § 2J1.2(c)(1). In cases involving obstruction of an investigation or prosecution for a criminal offense, the Accessory After the Fact Guideline, §2X3.1, applies. Here, "because the offense involved obstruction of an investigation that includes the use of weapons of mass destruction resulting in death for which the offense level is 43, the base offense level is 30."[2] PSR ¶ 30. This Guideline applies regardless of whether the defendant's actions actually obstructed a federal criminal investigation. Indeed, the cross-reference itself makes clear that it applies in any case that "involved the obstruction of an investigation or prosecution of a criminal offense." The Guidelines do not indicate that the defendant must be successful in obstructing the investigation for this cross-reference to apply. To the contrary, the government need only prove that the defendant intended or attempted to obstruct an investigation. *See United States v. Conley*, 186 F.3d 7, 24-25 (1st Cir. 1999) (finding cross-reference to 2X3.1 "is intended to provide an enhanced offense level for the crime of obstruction of justice when the obstruction is in respect to a particularly serious offense" and evidence that the defendant attempted to obstruct justice is sufficient "to trigger the cross-referencing provisions of the guidelines."); *accord United States v. Giovanelli*, 464 F.3d 346, (2d Cir. 2006) (applying 2X3.1 Guideline under an endeavoring to obstruct justice theory in a prosecution for violation of 18 U.S.C. §1503). The stipulation of facts clearly gets

[2] The defendant appears to have changed his position since the Rule 11 hearing regarding the applicability of § 2X1.3. At the Rule 11 hearing, defense counsel indicated that "we believe that the terrorism enhancement does not apply, [so] that's it's a level 30 minus 3, is 27." Rule 11 Tr. at 25.

the government over that hurdle. Accordingly, at a minimum, the Court should determine that the defendant's adjusted offense level is 30 (97-121).

The PSR also correctly applies the terrorism enhancement under §3A1.4. That Guideline calls for a 12-level increase in the offense level and a criminal history category of VI "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4(a). The Application Notes to the Guideline explain that "an offense that involved . . . obstructing an investigation of a federal crime of terrorism . . . shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism." *Id*. at App. Note 2; *see United States v. Ashqar*, 582 F.3d 819, 825-26 (7th Cir. 2009) (affirming application of enhancement based on defendant's refusal to testify because defendant intended to obstruct an investigation into a federal crime of terrorism); *but see United States v. Bihieri*, 356 F. Supp. 2d 589, 598 (E.D. Va. 2005) (holding that application of § 3A1.4 requires a finding of actual obstruction); and *United States v. Benkahla*, 530 F.3d 300, 313 (4th Cir. 2008) (upholding application of § 3A1.4 enhancement where evidence established defendant actually obstructed a terrorism investigation). The defendant's conduct was intended to obstruct a federal terrorism investigation. His efforts succeeded in interfering and influencing the investigation in that they delayed the identification, acquisition, and analysis of critical evidence and jeopardized the admissibility at trial of critical evidence against Tsarnaev. Additionally, the defendant's actions caused the expenditure of substantial governmental resources. Applying the terrorism enhancement results in an adjusted offense level of 42 and a criminal history category of VI. This offense level is reduced by three levels due to the defendant's acceptance of responsibility, resulting in a total offense level of 39 and Guideline Sentencing Range of 360-life for a person with criminal history category of VI. Kadyrbayev's sentencing range is, however, statutorily

capped at 25 years (300 months) based upon the statutory maximum penalties for Counts One and Two. While the government contends that the terrorism enhancement applies in this case, many of the factors necessitating the increase in criminal history category are not applicable to Kadyrbayev. In enacting the terrorism enhancement, the Sentencing Commission recognized that terrorism offenses are more difficult to deter and a terrorist is more likely to be a repeat offender. *United States v. Hammoud*, 2012 WL 2354639, *6 (4th Cir. 2012) (unpub.). Consequently, the Sentencing Commission chose to create a "uniform criminal history category for all terrorists under §3A1.4(b), because even terrorists with no prior criminal behavior are unique among criminals in the likelihood of recividism, the difficulty of rehabilitation, and the need for incapacitation." *Id.* (omitting citations). Because Kadyrbayev's crimes, while serious, are unlikely to be repeated and did not include any crimes of violence, the Government believes that a consideration of the factors specified at 18 U.S.C. §3553(a) demonstrate that a sentence of 7 years is reasonable.

III. Factors To Be Considered Under 18 U.S.C. § 3553(a)

The most salient § 3553(a) factors here are: "the nature and circumstances of the offense and the history and characteristics of the defendant;" and "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, . . . to provide just punishment for the offense; . . . [and] to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(1) and (2)(A) and (D). These factors present a combination of aggravating and mitigating factors and, in the aggregate, call for a serious sentence.

A. Deterrence of Criminal Conduct

The obstruction of any legitimate criminal investigation is a serious crime. *See Brogan v. United States*, 522 U.S. 398, 405 (1998). Obstruction of a terrorism investigation is categorically

more serious than most other obstruction crimes. This is so because terrorist crimes pose tremendous risks to public safety and, as was the case with the Marathon bombers, that risk continues beyond the initial crime. Thus, among the most important functions served by sentencing this defendant is the deterrent message the sentence will convey to those who might consider impeding a law enforcement investigation into ongoing conduct that presents a public danger . *See United States v. Flores-Machicote*, 706 F.3d 16, 23 (1st Cir. 2013) ("Deterrence is widely recognized as an important factor in the sentencing calculus.") (*citing* 18 U.S.C. § 3553(a)(2)(B)). Deterrence is "particularly important in the area of white collar crime." *United States v. Prosperi*, 686 F.3d 32, 47 (1st Cir. 2012) (citations omitted). Few cases better illustrate the importance of deterrence than this one. The law enforcement imperative of identifying the bombers and gathering evidence of their crimes as quickly as possible cannot be overstated. The sentence imposed by the Court should send a clear and unequivocal message: the Court will not tolerate the obstruction of a terrorism investigation and such conduct will be severely punished.

B. Nature and Circumstances of the Offense

While the Court is well aware of the nature and circumstances of the offenses here, certain aspects of the defendant's conduct bear emphasis. The details of the defendant's conduct demonstrate that his crime was especially serious. He sought to obstruct a terrorism investigation in its critical, embryonic phase. He did so when the terrorist was still at large. He compounded his obstructive conduct even after learning of the shootout in Watertown – that is, even after he had abundant reason to believe that Tsarnaev was bent on further violence. And he did so in the face of direct pleas from law enforcement for information concerning the bombers. The investigation into the Boston Marathon bombings is in a category of investigations in which the evil of impeding the work of the police should be universally recognized.

Finally, as the government has argued with regard to Kadyrbayev's co-defendants, although there is no legal obligation of hue and cry, the defendant's decision not to call the police bespeaks a failure to recognize a fundamental moral principle – if one has information that may be useful in preventing harm to fellow citizens, one has a moral duty to report it. Hours before Tsarnaev murdered Officer Collier, the defendant recognized that his friend Tsarnaev was the fugitive bomber. Any reasonable, decent person possessed of the information the defendant had would have recognized that immediate apprehension of Tsarnaev was a public-safety imperative. Had Kadyrbayev or his co-defendants done so, then Tsarnaev's identity as the bomber may have been known to police hours before the murder of MIT Police Officer Collier at approximately 10:30 p.m. and the subsequent violent confrontation in Watertown. [3]

C. History and Characteristics of the Defendant

Unlike many defendants who appear before this Court, the defendant grew up in a stable, non-abusive family. *See* PSR at ¶¶ 49-57. This background is both an aggravating factor, because the defendant's upbringing doubtless made clear to him the wrongfulness of his conduct, and a mitigating factor, because it suggests little likelihood of recidivism, especially when viewed in light of the defendant's apparent history of abiding by the law.

As the government has stated with regard to Kadyrbayev's co-defendants, the defendant's youth does not provide a basis for a sentence below the advisory GSR. The advisory Guidelines do not treat age as a mitigating factor. *See* U.S.S.G. § 5H1.1. This case illustrates the wisdom the Sentencing Commission's view of the irrelevance of age in most cases. Society reasonably expects all adults – young and old alike – to refrain from obstruction of a criminal investigation.

[3] The government does not ask the Court to find that a call by Kadyrbayev to the police would have resulted in earlier apprehension of Tsarnaev. The moral obligation at issue is rooted in the possibility that calling the police *could* have made a difference, regardless of how one assesses the likelihood that it would in fact have made a difference

D. Need for the Sentence Imposed to Reflect the Seriousness of the Offense and Promote Respect for the Law, to Provide Just Punishment for the Offense

For the reasons already discussed, the defendant's crimes were serious and warrant a significant sentence of imprisonment. Incarceration for seven years will reflect the seriousness of the offense and promote respect for the law, while recognizing that the crime was nonviolent, the defendant accepted responsibility for his crimes, and his risk of recividism is low. Thus, notwithstanding the seriousness of the defendant's crimes and the need for a sentence that provides general deterrence and promotes respect for the law, a sentence of 7 years is reasonable.

Conclusion

For the foregoing reasons, the Court should sentence the defendant to term of imprisonment for a period of 7 years.

Respectfully submitted,

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Certificate of Service

I do hereby certify that a copy of foregoing was served upon the counsel of record for the defendant by electronic notice on this 27th day of May 2015.

/s/ B. Stephanie Siegmann
B. Stephanie Siegmann